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In the Supreme Court of the United States

OCTOBER TERM A. D. 1944.

No. 496.

THE TERMINAL AND SHAKER HEIGHTS REALTY COMPANY,
Petitioner,

vs.

CHARLES L. BRADLEY and JOHN P. MURPHY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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AUTHORITIES CITED.

Cases Cited or Distinguished.

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BRIEF OF RESPONDENTS.

RESPONDENTS' POSITION.

This case presents no question of law concerning which there is any conflict of authority, any lack of uniformity of decision between the different circuit courts of appeals, nor does it involve a single principle of law the soundness of which is disputed by the adverse parties.

The facts were complicated; they were largely based on conflicting oral testimony, on the credibility of witnesses, most of whom were interested, and on inferences to be drawn from a multitude of documents. The Special Master, with painstaking care, sifted the evidence and, by an exhaustive report, made what the Circuit Court of Appeals referred to as "extended" [1] findings of fact. These findings of fact were adopted by the District Court, with certain additional findings of its own, and all was confirmed by the Circuit Court of Appeals.

It is here stated by the respondents, with confidence and without reservation, that the facts, as found by the

[1] R. 562.

tribunals below, present no question either of public interest or of general law about which there is or can be a dispute.

The "Statement of the Case," beginning on page 7 of petitioner's brief, is not based on the facts as found by the courts below, but rather on assertions, in many instances not supported by the record, and, in others, upon testimony rejected by the courts below as having no probative value. Petitioner now seeks a reexamination of the evidence, the weight and effect of which have three times been found against it.

Respondents' Statement of the Case herein is based upon the findings of the courts below (all of which are ignored in petitioner's brief) and these findings will themselves demonstrate the soundness of respondents' position.

STATEMENT OF THE CASE.

(1) The Fiduciary Relationship.

Midamerica was the owner of the Higbee securities, which are the subject of this controversy. (F.* 1, R. 492.) Bradley and Murphy began their negotiations with Midamerica to purchase its holdings of Higbee securities in January 1937. (F. 2, R. 492.) These negotiations were carried on with Mr. Ball, who, at that time, was a director of Midamerica, and its sole stockholder. (F. 1 and 2, R. 492, F. 6, R. 493, R. 289.) Mr. Ball, during these negotiations, donated his Midamerica stock to the Ball Foundation. (R. 466.) (Hereinafter both Mr. Ball and the Ball Foundation will be referred to as the Ball Foundation.) The Ball Foundation, on May 5, 1937, sold to Robert Young and associates (hereinafter referred to as the Young syndicate) the common stock of Midamerica. (F. 7, R. 494.) At the beginning of the negotiations with the Young Syndi-

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* Explanation of abbreviations:

F.—Findings of Special Master.
Br.—Petitioner's Brief.
R.—Record.

cate, it was disclosed and understood that the Higbee securities, then owned by Midamerica, were being held for sale to Bradley and Murphy and therefore excluded from the Young negotiations. (F. 3, R. 493.) In accordance with and pursuant to this understanding, Midamerica, by means of a partial liquidation of its assets, distributed the Higbee securities to the Ball Foundation on May 4, 1937,—one day before the purchase of Midamerica's common stock by the Young Syndicate from the Ball Foundation. (F. 6, R. 493.) At the time when the Young Syndicate purchased Midamerica, Bradley and Murphy had practically concluded negotiating for Midamerica holdings of Higbee's securities. (Finding of the District Judge No. 5, R. 529.) Ten days later, on May 15, 1937, Bradley and Murphy concluded their negotiations and purchased the Higbee securities. (F. 11, R. 495.)

Petitioner contends that this purchase by Bradley and Murphy created a conflict of interest between the duty Bradley and Murphy owed to Midamerica and their personal interest as owners of the Higbee securities.

Bradley and Murphy were officers of Midamerica and Bradley was a director at the time they purchased the Higbee securities. (F. 10, R. 494.)

Midamerica had nothing but a nominal interest in The Cleveland Terminals Building Company on May 15th, 1937 (F. 29, R. 498); and The Cleveland Terminals Building Company, although the holder of the legal title to the building occupied by The Higbee Company, had no equity in the building. The real owner of the building, together with the lease and rentals, was The Metropolitan Life Insurance Company (F. 32, R. 498),—not a party to, or concerned in, this litigation.

No negotiations were had between Higbee and The Cleveland Terminals Building Company with respect to any rental relationships involving The Higbee Company at a time when Bradley or Murphy were either directors

or officers of Midamerica. (R. 307-8.) Quite obviously there was no occasion for such negotiations during 1937, since the contract of 1935 between Higbee Company and The Cleveland Terminals Building Company fixed the rental relationship until March of 1940. (106 F. 2d 796, 797, 798, by stipulation made a part of this record, R. 215.)

(2) Estoppel.

At the time when they purchased the Higbee securities in 1937, Bradley and Murphy gave to the Ball Foundation, in partial payment for such purchase, their personal note for $540,000 secured by the Higbee securities. (F. 11, R. 495.) Midamerica, on March 2, 1942, acquired from the Ball Foundation this note together with the collateral pledged as security therefor including the Higbee securities. (F. 41, R. 500.) The following day Midamerica declared it due, and notified Bradley and Murphy of its intention to sell the collateral (consisting of the Higbee securities) at public sale on March 13, 1942, and reserved its right to bid at the sale. (F. 44, R. 501.) The note by its terms provided that the holder thereof need not account to the makers for any overplus received at the sale; thereby, in effect, prohibiting any other bidder from bidding in competition with Midamerica, thus enabling Midamerica, without cost, to acquire the Bradley-Murphy holdings, leaving in them no equity of redemption. (R. 23.)

Midamerica, at the time it served said notice, had knowledge of all facts relative to the rights it was asserting in these proceedings, and intended that the position which it took would be acted upon by Bradley and Murphy. (F. 45, R. 501.)

Bradley and Murphy did act upon said notice and changed their position for the worse (F. 46, R. 501); and among other things (F. 50, F. 51, F. 52, R. 502, F. 55, R. 503) borrowed $560,000 and paid the same to Midamerica in full payment of said note. Midamerica thereupon sur-

rendered to Bradley and Murphy the cancelled note and all collateral described therein consisting of the Higbee securities. (F. 57, R. 503.)

(3) Laches.

Although Bradley and Murphy concluded their purchase of the Higbee securities on June 4, 1937 (F. 11, R. 495), and although Bradley notified Young and Kirby of the purchase on June 7, 1937 (F. 12, R. 495) and although public announcement of the purchase was made in Cleveland and New York newspapers on June 28, 1937 (F. 13, R. 495) and although Bradley and Murphy thereafter devoted their time and efforts to the affairs of The Higbee Company in the management of its store business and the development of a Plan of Reorganization acceptable to its creditors (F. 14, R. 495), and although the affairs of The Higbee Company during the administration of Bradley and Murphy improved greatly (F. 15, R. 495), Midamerica did not at any time until March 28, 1942, more than four years later, assert that purchase of the Higbee securities by Bradley and Murphy was a violation of any fiduciary duty which Bradley and Murphy owed to Midamerica. (F. 35, R. 499.) As stated in the opinion of the Circuit Court of Appeals:

> "In fact the entire record shows by convincing evidence that not until after The Higbee Company had become a very profitable enterprise was the present claim asserted." (R. 564.)

ARGUMENT.

The petitioner contends:

1. Error was committed by the Circuit Court of Appeals in failing to find that a conflict of interest was created by the purchase by Bradley and Murphy of the Higbee securities.

2. Error was committed by the Circuit Court of Appeals in its determination that the claim of the petitioner is barred by estoppel.
3. Error was committed by the Circuit Court of Appeals in its determination that the claim of the petitioner is barred by laches.

Conflict of Interest.

The facts upon which petitioner relies consist, in the main, either of unwarranted inferences or of testimony rejected by the Special Master and by him found to be discredited. The report of the Master was approved and adopted by the District Court, which in turn was affirmed by the Circuit Court of Appeals.

The Special Master found that Midamerica *never had** more than a nominal interest in The Cleveland Terminals Building Company (F. 29, R. 498), and The Cleveland Terminals Building Company in turn had no equity in the building occupied by The Higbee Company. (F. 32, R. 498, 499.) Hence nothing which Bradley and Murphy could do could possibly have affected Midamerica.

It is nothing short of pure sophistry to argue that even though Midamerica's claims were allowed by the Court for nominal amounts only, they should nevertheless be considered, for the purposes of this controversy, as representing a real interest, because Midamerica asserted them for their face amounts. It follows that petitioner's argument, that the Circuit Court of Appeals treated its determination of Midamerica's claims against The Cleveland Terminals Building Company as a *nunc pro tunc* adjudication, is equally unwarranted. When the Circuit Court of Appeals allowed these claims for nominal amounts it determined judicially that, in the hands of Midamerica, they *never* represented more than a nominal interest.

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* Emphasis throughout that of respondents.

As the same Court held in *Ashman v. Miller,* 101 F. 2d 85, relied upon by petitioners, it is when, and only when, a damage might result to the interest of the corporation from the relationship which its directors had assumed, that a fiduciary duty is involved. Of course, if the corporation has no interest, then a non-existent interest could not be damaged.

There never was a time, after Bradley and Murphy became the owners of the Higbee securities, when there was *even a possibility* that Midamerica could be damaged by anything which Bradley and Murphy could do as the owners of the Higbee securities.

The undisputed evidence and the findings of the courts below disclose that, if the inference be indulged that Midamerica had an interest in The Cleveland Terminals Building Company (in respect of which the proof and the findings are quite to the contrary (F. 29, R. 498)) nevertheless, since (1) The Cleveland Terminals Building Company had no equity in the building occupied by The Higbee Company (F. 32, R. 498-499), (2) the new lease was negotiated solely with The Metropolitan Life Insurance Company, and not with The Cleveland Terminals Building Company (R. 308) and (3) the new lease was a contract between The Higbee Company and The Metropolitan Life Insurance Company and not with The Cleveland Terminals Building Company, it becomes obvious that there never was *even a possibility* that Midamerica could be damaged by anything which Bradley and Murphy, as the owners of the Higbee securities, could do or fail to do.

As pointed out earlier in this brief, none of the assignments of error presents a question of general law concerning which there is any conflict. The Circuit Court of Appeals, in this case, stated the law thus:

> "Wherever one person is placed in such a relation to another that he becomes interested for him or with him in any subject of property or business, he is in such a fiduciary relation that he is prohibited from acquir-

> ing rights in the property or business antagonistic to the person with whose interests he has become associated; * * *." (R. 564-5.)

This is the precise holding in the case of *Irving Trust Co. v. Deutsch*, 73 F. 2d 121, relied on by the petitioner. The facts, however, as found by the three tribunals below, completely repel the existence of any fiduciary relationship or conflict of interest. The Circuit Court of Appeals in its decision points out:

> "The Cleveland Terminals Building Company had only a nominal interest in the building, and the fact that Bradley and Murphy became the owners of the Higbee securities could in no way interfere with any real interest of Midamerica or C.T.B. Hence no fiduciary duty toward Midamerica arose with reference to these securities." (R. 567.)

In the *Irving Trust Company* case the directors had negotiated a contract for their corporation which was "concededly essential to" the business of the corporation. They then took the contract themselves, claiming that they had the right to do so because their corporation did not have the resources to carry it out. The contract proved valuable and the directors realized large profits which the court very properly required them to account for to their corporation.

But again the findings of fact repel any such relationship in the present case. In the first place, Bradley and Murphy conducted the major portion of their negotiations for the purchase of the Higbee securities with Midamerica itself at a time when Midamerica owned them. (F. 1 and 2, R. 492-493.) Moreover, prior to such purchase by Bradley and Murphy, and with the full knowledge of the Young Syndicate, Midamerica voluntarily divested itself of the Higbee securities for the very purpose of enabling them to be sold to Bradley and Murphy. (F. 3 and 6, R. 493.) At no time prior to such purchase by Bradley and Murphy did Midamerica or its new owners, the Young Syndicate,

negotiate for the purchase of these securities nor did they say anything to Bradley and Murphy relative to any desire on the part of Midamerica to acquire them. (F. 16, R. 496.) Finally the lower courts found that the purchase by Bradley and Murphy was not the result of any confidence reposed in them by the Young Syndicate or of any opportunity created by any knowledge or influence obtained through employment by or association with the Young Syndicate (F. 17, R. 496); that at no time, after Midamerica voluntarily disposed of the Higbee securities, did it have any interest in or interest in acquiring them, and at no time did their purchase by Bradley and Murphy hinder or defeat any plans or purposes of Midamerica. (F. 20, R. 496.)

The facts incident to the case of *Meinhart v. Salmon*, 249 N. Y. 458 are nowhere to be found in this case. Petitioner was the owner of the Higbee securities (F. 1, R. 492) and it negotiated with Bradley and Murphy, through its stockholder Ball, for the sale of these very same securities. (F. 2, R. 492.) The petitioner and its stockholders were at all times aware that these securities were to be sold to Bradley and Murphy. (F. 3, R. 493.) In fact, petitioner participated in making the sale possible by distributing these securities to the Ball Foundation for the purpose of sale to Bradley and Murphy. The Young Syndicate, which later became the owner of Midamerica stock, was aware of and consented to this distribution. (F. 6, R. 493.)

We now find the Messrs. Young and Kirby, owners of petitioner's stock, making claim to these securities indirectly through the petitioner, this despite the inability of Young and Kirby to substantiate their direct claims to these securities in the actions which they have now abandoned by acquiescing in the decisions of the Circuit Court of Appeals as stated in petitioner's brief. (Br. 3.)

Hence, as asserted at the beginning of this brief, there is no dispute either between the courts of appeals of the several circuits nor between the parties themselves with

respect to any principle of substantive law. In the last analysis, the holding of the Circuit Court of Appeals in the present case is precisely in accord with the principle of law announced in the *Irving Trust Company* case. The only difference between the two is one of fact. The facts, as found by the courts below, fail totally to support any factual similarity or analogy to the *Irving Trust Company* case. Petitioner seeks here to re-examine and re-argue, as he did in the three tribunals below, the probative value of evidence and inferences to be drawn from testimony, all of which have been thrice determined against him.

Estoppel.

During the trial of these proceedings Midamerica demanded payment by Bradley and Murphy of their note in the amount of upwards of $560,000. (F. 56, R. 503.) Complying with this demand Bradley and Murphy borrowed the necessary sum and paid it in open court to Midamerica. (F. 57, R. 503, R. 470.) Midamerica thereupon addressed a letter to J. P. Morgan & Company admitting Bradley and Murphy's ownership of said securities by authorizing J. P. Morgan & Company to recognize Bradley and Murphy as the owners of a participation in the Higbee securities which was then held by J. P. Morgan & Company for the benefit of itself and others. At the same time Midamerica surrendered to Bradley and Murphy the collateral, which included the Higbee securities. (F. 57, R. 503.) This was at the very time when Midamerica claimed that it was the equitable owner of the very collateral which it surrendered upon payment of the note. It was at the very time when Midamerica sought to seize the Higbee securities by means of a public sale at which, in effect, no one could bid against it. It was at the very time when Midamerica frankly admits that it didn't expect Bradley and Murphy would be able to finance themselves because of the pendency of an appeal by two preferred stockholders attacking the Plan of Reorganization of The Higbee Company, which Plan had been pre-

viously approved by the District Court. (F. 49, R. 502.) It was at the very time when, to protect themselves against Midamerica's scheme to seize the Higbee securities, Bradley and Murphy were compelled to purchase the holdings of these two excepting stockholders. (F. 51, R. 502.) They were obliged to incur the expense necessary successfully to resist the efforts of the principal owner of Midamerica to prevent the dismissal of such appeal. (F. 52, R. 502, F. 54, R. 502.) And finally, after thwarting the efforts of Midamerica to prevent them from financing themselves, Bradley and Murphy borrowed the money and paid it to Midamerica. (F. 57, R. 503.)

Obviously, if Bradley and Murphy were called upon by petitioner to pay the note, such demand and such acceptance of payment by petitioner ratified and validated Bradley and Murphy's purchase from the Ball Foundation. By its demand for payment Midamerica not only placed itself in a position sharply inconsistent with the position which it asserts in these proceedings, but it also expressed its acquiescence in the sale and recognized the right of Bradley and Murphy. Again, as was stated by the Circuit Court of Appeals:

> "Whether this be considered as a binding election of remedies or as an equitable estoppel (*Miller v. Ahrens*, 163 F. 870; *Quinlan v. Myers*, 29 O. S. 500; *Frederickson v. Nye*, 110 O. S. 439), in any case Midamerica is barred from changing its ground after Bradley and Murphy have altered their position substantially for the worse. All of the elements of equitable estoppel are presented. *Railway Co. v. McCarthy*, 96 U. S. 258; *Texas Co. v. Gulf Refining Co.*, 26 Fed. (2d) 394 (C. C. A. 5)."

Laches.

For slightly less than five years the petitioner failed to assert any claim, and waited until after The Higbee Company, through the efforts of Bradley and Murphy, had become a very profitable enterprise. Bradley and Murphy,

with full knowledge of the petitioner, devoted their time and effort over a period of more than four years to place the department store in efficient financial operation. After the hazard was all over, and the skill and knowledge of Bradley and Murphy had made the investment profitable, then, for the first time, petitioner claims the investment. This, equity will not allow. *Harris v. Wallace Mfg. Co.*, 84 O. S. 104; *Alexander v. Phillips Petroleum Co.*, 130 F. 2d 593, 605.

Again petitioner attempts to present to this Court a wholly false issue, that the Circuit Court of Appeals went beyond the matters properly before it and held petitioner to be barred by laches although that question was not raised in the Statement of Points filed by petitioner in the Circuit Court of Appeals, and that the ruling of the Circuit Court of Appeals was contrary to that of the District Court. For the convenience of this Court, the statement in plaintiff's brief (Br. 27) and the Opinion of the District Court are set forth in parallel columns as follows:

Petitioner's Brief Page 27.	**Decision of the District Court R. 525, 526.**
"The Circuit Court agreed with the conclusion of the Special Master (R. 506) and the District Judge (R. 526) that the statute of limitations does not bar this claim, *but overruled the District Court in holding that laches existed irrespective of the statute of limitations.*"	"No justifiable reason has been advanced why Young and Kirby, with knowledge of the Higbee reorganization and the assertion of legal and complete ownership of the Higbee Junior indebtedness and common stock by Bradley and Murphy in that proceedings, took no action for four years to challenge such ownership. If other ground for rejection of such claim were not adequate, this unreasonable lapse of time would support, or alone sustain, a denial of the equitable relief here sought."

Perhaps a word should be said about the assertion by petitioner that it withheld asserting its claim against Bradley and Murphy because it was ordered so to do by the District Court.

There is not one word in the ruling of the Special Master quoted on page 28 of petitioner's brief from which it could be inferred that the Special Master attempted to discourage the filing of claims to ownership of the Higbee securities. He merely stated that he preferred to develop a Plan of Reorganization with dispatch, leaving for future determination the adjudication of the claims which had already been asserted. At that time claims had been asserted by Bradley and Murphy (R. 2, R. 24), by The Cleveland Terminals Building Company (F. 24, R. 497) and by the assignee of The Vaness Company (F. 25, R. 497) but *not* by the petitioner here.

To assert that petitioner relied upon the ruling of the Bankruptcy Court, at a time when other interests had asserted their claims, is to rely upon a ruling which never existed, at a time when the petitioner had no thought of asserting a claim for the very definite reason as stated in the opinion of the Circuit Court of Appeals that the record shows "by convincing evidence that not until after The Higbee Company had become a very profitable enterprise was the present claim asserted." (R. 564.)

CONCLUSION.

In the absence of clear error, this Court will not ordinarily reexamine findings of fact in which both lower courts have concurred. As said by Chief Justice Hughes, on page 558 of the opinion in *Texas & New Orleans R. R. Co., et al. v. Brotherhood of Ry. & Steamship Clerks, et al.,* 281 U. S. 548:

> "On the questions of fact, both courts below decided against the petitioners. Under the well established rule, this court accepts the findings in which two courts concur, unless clear error is shown."

It is not believed that this rule was intended to be abrogated in the recent decision of *Baumgartner v. United States of America,* 88 L. Ed. 1155, wherein Justice Frankfurter said, on page 1158:

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service."

In *Magnum Import Co., Inc. v. Coty*, 262 U. S. 159, Mr. Chief Justice Taft said, on page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The questions presented fail to meet either test. There is no conflict of decision. No question of importance to the public is involved. There is presented no question concerning which there is a substantial doubt.

It is therefore submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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